APPENDIX A.

Opinion of Circuit Court of Escambia County, State of Florida.

In the Circuit Court of Escambia County, State of Florida.

Roy Michael Felton, Ralph Franklin Moore, James Hollingshead, Joseph W. Spirakis and Ralph James Armantrout, Appellants Vs. The City of Pensacola, Appellee. 65-1499, 65-1501, 65-1503, 65-1505, 65-1507.

An Appeal from the Municipal Court of the City of Pensacola, Florida. W. D. Richbourg, City Judge.

Jack S. Graff for Appellants

William C. Jones for Appellee

MELVIN, WOODROW M. CIRCUIT JUDGE.

Each appellant has perfected his appeal from the judgment and sentence imposed against him in the Municipal Court of the City of Pensacola, Florida, for violation of Section 20-36 of the Ordinances of said city relative to the unlawful exposure, circulation, sale or distribution of obscene, scandalous or libelous printed material.

The publications which are the subject matter of each prosecution were in each case admitted in evidence by stipulation and were inspected by the City Judge.

Each appellant presents on appeal three points:

1. Whether the publications involved are obscene as defined by the United States Supreme Court.

2. Whether or not the City ordinance involved is unconstitutional on its face.

3. Whether or not the procedure utilized by the City is violative of the Constitutional rights of the defendants.

The points on appeal will be considered in the order presented.

The publications were received in evidence by agreement between the City Prosecuting attorney and counsel for each defendant, and were inspected by the trial Judge. Such exhibits are, of course, a part of the record on appeal, and have been inspected by this Court. These publications had been placed on public display by each defendant in his news-magazine place of business in the City of Pensacola, and thus were offered for distribution and sale to the general public.

The test of obscenity as set forth in the case of Roth vs. United States, 354 U.S. 476, is

> "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."

The trial Judge held that the subject materials met that test. Upon review by this Court of the materials in evidence, it appears that the trial Judge was eminently correct in his decision.

It was the province of the trial Judge, as the trier of the facts, to measure the publications by what he determined to be the common conscience of the community and arrive at the decision as to whether or not they were in fact obscene. See Rachleff vs. Mahon, 124 So. (2d) 878.

It should be noted that the Constitutional guarantees relative to freedom of speech or freedom of the press

were never intended to serve as a shelter for an emporium of filth for filth's sake.

The appellants next contend that the ordinance is unconstitutional on its face because such ordinance does not limit its application to one who *knowingly* offends its provisions, that is to say, who *knows* that the material offered for public distribution and sale is obscene. The appellants rely upon Smith vs. People of State of California, 361 U.S. 147.

Although the Ordinance of the City of Pensacola is silent as to requirement of scienter, or knowledge, this Court construes such Ordinance to impliedly include such requirement. See Cohen vs. State, 125 So. (2d) 560, text 563. The Ordinance, thus construed, is a valid law.

The appellants did not, in the trial Court, question by motion to quash the pending charges as being legally sufficient. They do question on appeal the sufficiency of the evidence to establish their knowledge of the obscenity of the magazines.

It is not necessary that the City produce witnesses to testify that the appellants examined or read a particular magazine in order to charge him with knowledge of its contents. The circumstances surrounding the possession, display or offering for sale may warrant an inference that he was aware of its contents. See Smith vs. California, 361 U.S. 154. When measured by such test, the evidence is sufficient to charge appellants with knowledge.

The remaining point presented is whether the procedure utilized by the City in obtaining the evidence submitted violated the Constitutional rights of the appel-

lants. The Court has previously noted that all exhibits were received in evidence by agreement of counsel for the City and for appellants. Therefore the question — if any there could be — of procedure is moot.

The Judgments and Sentences appealed are each Affirmed.

It is so Ordered.

This 28th day of February, A.D. 1966.

Woodrow M. Melvin
Circuit Judge.

Filed Feb. 28, 1966 recorded in the public records of Escambia County, Florida, in the book and page noted above. J. A. FLOWERS, Clerk Circuit Court by Glenda Maddox, Deputy Clerk.

APPENDIX B.

Opinion of the District Court of Appeal, First District, State of Florida.

In the District Court of Appeal, First District, State of Florida, January Term, A.D., 1967

Roy Michael Felton, Ralph Franklin Moore, James Hollingshead, Joseph W. Spirakis and Ralph James Armantrout, Appellants, vs. The City of Pensacola, Appellee. Case No. H-472.

Not Final Until Time Expires to File Rehearing Petition and Disposition Thereof If Filed

Opinion filed July 6, 1967.

An Appeal from the Circuit Court for Escambia County. Woodrow M. Melvin, Judge.

Levin, Askew, Warfield, Levin & Graff; and Haas, Holland, Freeman, Levison & Gibert, for Appellants.

William C. Jones, for Appellee.

CARROLL, DONALD J.

The appellants have appealed from an order entered by the Circuit Court for Escambia County, affirming a judgment of the Municipal Court of the City of Pensacola, convicting them of violating a municipal ordinance declaring unlawful the exposure, circulation, sale, or distribution of obscene printed materials.

While the parties hereto have designated and treated these proceedings as an appeal, the proceedings technically should be in certiorari since we are herein asked to review an order entered by a Circuit Court sitting in the exercise of its appellate jurisdiction. See Florida Civil Practice After Trial, Section 7.38, page 430. Pursuant to the provisions of Sec. 59.45, Florida Statutes,

however, we will regard and act upon the notice of appeal and the record herein as a petition for certiorari duly presented to this court. We will, therefore, reach our conclusions in accordance with the principles applicable to proceedings in certiorari. In the opinion below we shall refer to the petitioners for writ of certiorari as the appellants.

The printed materials involved in this case are nudist magazines which were seized at the appellants' newsstands by a city police officer. The first question presented for our determination in this appeal is whether the said seizure was conducted in accordance with constitutional guarantees (and we hold herein that the seizure was not so conducted) and, if not so conducted, whether the appellants at their trial preserved or waived their right to object to the admission into evidence of the magazines so seized. Since we hold herein that the appellants waived their said right, we must also answer the ultimate question in this appeal—were those nudist magazines in fact legally obscene under the mentioned ordinance of the City of Pensacola?

The transcript of the testimony taken at the trial in the Municipal Court establishes that the nudist magazines were seized by one Robert Godwin, a city police officer. He did not himself, however, arrest any of the defendants. The arrests were later made by the chief of police. It is evident from the record that no search warrant has ever been issued against, or served upon, the defendants, authorizing the seizure of the said magazines.

The testimony of Godwin was stipulated to be applicable as to all of the defendants. Asked at the trial by the defense attorney as to what test he used to de-

termine whether or not a publication violated the law, Godwin testified:

> "I used no test, sir; I just used my own good judgment that nude men and women in a magazine together would be a violation of the law."

Immediately thereafter he also testified that that was the only test he used. Earlier in his cross-examination by the defense counsel, Godwin was asked as to what criteria he used to determine whether or not the particular publications violated the law. The officer responded:

> "I was told by the Chief of Police to go up there and if they had this sort of literature up there to purchase or take some of this literature."

The importance of this issue raised in the appeal concerning the legality of the seizure procedure lies in the fact that the resolution of this issue requires us to determine whether the police officer's actions violated the guarantee of the freedom of speech and the press in the First Amendment to the United States Constitution and the guarantee of due process of law in the Fourteenth Amendment in the sensitive and controversial area of obscenity in printed materials. In considering such an issue, of course, the decisions of the United States Supreme Court are controlling.

In Marcus v. Search Warrant of Property, 367 U.S. 717, 6 L.ed. 2d 1127, 81 S. Ct. 1708 (1961), a Missouri court had issued search and seizure warrants against a wholesale distributor of magazines, newspapers, and books, and against operators of retail newsstands, under Missouri procedures authorizing the search for and seizure of allegedly obscene publications preliminary to

their destruction if found by a court to be obscene. The distributor and newsstand operators moved to quash the warrants and suppress as evidence the property seized pursuant thereto, on the ground, inter alia, that the Missouri procedures were invalid under the guarantee of free speech assured against state abridgment by the Fourteenth Amendment. The Missouri court denied the motions and found the items seized to be obscene. The Supreme Court of Missouri sustained the validity of the procedures. On appeal to the United States Supreme Court, the latter reversed the judgment, ruling that the Missouri procedures lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. Before reaching this ruling the U.S. Supreme Court first recognized the doctrine that "a State's power to suppress obscenity is limited by the constitutional protections for free expression. . . ." and that "under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech."

As in the case at bar, the printed materials in the Marcus case were seized after a police officer determined them to be obscene. Concerning the constitutionality of this procedure, the United States Supreme Court held:

> "We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the

reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene. The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene. . . publications.' So far as appears from the record, none of the officers except Lieutenant Coughlin had previously examined any of the publications which were subsequently seized. It is plain that in many instances, if not in all, each officer actually made ad hoc decisions on the spot and, gauged by the number of publications seized and the time spent in executing the warrants, each decision was made with little opportunity for reflection and deliberation. As to publications seized because they appeared on the Lieutenant's list, we know nothing of the basis for the original judgment that they were obscene. It is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the constitutionally protected. They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly

on the question of obscenity. See generally 1 Chafee, Government and Mass Communications, pp. 200-218. In consequence there were suppressed and withheld from the market for over two months 180 publications not found obscene. The fact that only one-third of the publications seized were finally condemned strengthens the conclusion that discretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards than were here operative. Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees."

In the recent case of A Quantity of Books v. Kansas, 378 U.S. 205, 12 L. ed. 809, 84 S. Ct. 1723 (1965), the Supreme Court thus summarized its holding in the foregoing Marcus case:

"In Marcus the warrant gave the police virtually unlimited authority to seize any publications which they considered to be obscene, and was issued on a verified complaint lacking any specific description of the publications to be seized, and without prior submission of any publications whatever to the judge issuing the warrant. We reversed a judgment directing the destruction of the copies of 100 publications held to be obscene, holding that, even assuming that they were obscene, the procedures leading to their condemnation were constitutionally deficient for lack of safeguards to prevent suppression of nonobscene publications protected by the Constitution."

In our opinion, the seizure of the nudist magazines by the police officer in the case at bar falls squarely within the ban of the doctrine laid down by the U. S. Supreme Court in the Marcus case, supra, as well as by the courts in many other decisions following that doctrine. The procedure used in the present case, in which the police officer merely used his "own good judgment" in determining whether the publications were obscene, clearly contravened the guarantee of freedom of speech and the press in the First Amendment to the United States Constitution and the guarantee of due process of law in the Fourteenth Amendment.

Unfortunately for the appellants' position in this appeal, however, they are precluded by rules established in Florida from taking advantage of the fact that the police officer seized the nudist magazines by using an illegal procedure. At the trial in Municipal Court the appellants' counsel expressly announced that they had no objection to admitting the magazines into evidence against them. The prosecutor offered the magazines into evidence and asked the said defense counsel whether there was any objection to their being offered in evidence, and the said counsel replied: 'No objection." Later the prosecutor asked the said counsel: "And you understand and stipulate that the magazines in question will become part of the record and will be used in conjunction with the individual cases whereby they were stipulated as admitted?" To this the defense counsel replied: "This is correct." The Supreme Court of Florida has held that an accused waives his right to have evidence procured by illegal means excluded if he fails to make timely objection at the trial. See Fraterrigo v. State, 151 Fla. 634, 10 So.2d 361 (1942), and 13 Fla. Jur., Evidence, Sec. 184, page 186.

The appellants having thus affirmatively waived their right to object to the magazines being admitted into evidence, we cannot and do not hold that the Municipal Court committed error in so admitting them.

Since we must hold that prejudicial error was not committed in admitting the magazines into evidence because of the method of seizing them, we are then confronted with the ultimate problem of determining whether the nudist magaines seized from the appellants constitute "obscene printed materials" within the contemplation of the Pensacola ordinance which the appellants were charged with violating.

The question of what constitutes obscenity falls into one of the most difficult and mercurial areas of the law to-day. Judicial definitions of the term "obscenity" seem to be constantly changing, sometimes even in the same court or jurisdiction.

Because obscenity cases usually involve questions concerning the freedoms of speech and press as secured by the First Amendment to the U. S. Constitution, decisions of the federal courts are usually accorded special respect, especially those of the United States Supreme Court, the final authority on the interpretation of the First Amendment.

Looking, then, to the decisions of the U. S. Supreme Court, we find that the guidelines furnished in its decisions have undergone important changes during the last several years. In this consideration we have found very helpful the scholarly case comment by James Crabtree and Daniel Kearney, entitled "Constitutional Law: A Revised Standard of Obscenity," in the Summer, 1966, issue of the University of Florida Law Review, Vol. XIX, pp. 185-193.

The landmark decision of the United States Supreme Court in the field of obscenity is Roth v. United States, 354 U. S. 476, 1 L. ed 2d 1498, 77 S. Ct. 1304 (1957). In that case Roth was convicted in a U. S. District Court of violating a federal statute (18 USC sec. 1461), declaring that obscene materials are unmailable, and providing that whoever knowingly deposits such materials for mailing or delivery is criminally responsible. In a companion case, Alberts v. State of California, which is adjudicated in the same opinion and judgment as the Roth case, Alberts was convicted in the Municipal Court of the Beverly Hills Judicial District, State of California, of violating a California statute which makes criminally responsible every person who wilfully and lewdly writes or otherwise produces obscene or indecent material. The Supreme Court affirmed both convictions.

In the Roth opinion the U. S. Supreme Court first held categorically that "obscenity is not within the area of constitutionally protected speech or press." The court then defined obscene material as "material which deals with sex in a manner appealing to prurient interests." Finally, the court recognized the following as the proper test with which to determine whether certain material is obscene: ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."

In the recent case of Ginzburg v. United States, 383 U. S. 463, 16 L. ed 2d 31, 86 S. Ct. 942 (1966), the U. S. Supreme Court clarified, or expanded, the doctrine it had laid down in the Roth case. Ginzburg and three corporations controlled by him used the mails for distributing allegedly obscene literature, namely;

the magazine "Eros," containing articles and photo essays on love and sex; a biweekly newsletter dedicated to "keeping sex an art and preventing it from becoming a science"; and "The Housewife's Handbook on Selective Promiscuity." While specifically recognizing the Roth test as proper in determining whether materials are obscene, the Supreme Court pointed out that the following considerations are also pertinent in such a determination:

> "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the Roth test."

Finally, the Supreme Court held:

> "We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test.
>
> * * *
>
> "It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination the material is obscene even though in other contexts the material would escape such condemnation."

Our judicial duty, then, is to examine the nudist magazines involved in the case at bar in the light of the Roth test as supplemented by the additional considerations recognized in the Ginzburg case, in order to determine whether those magazines are legally obscene.

The magazines in question are apparently typical magazines of the nudist variety, filled with untouched photographs of nude men, women, and children, usually at a recreation area like a beach or swimming pool. We would think that such photographs would hold little interest for the "card-carrying" nudist but that the magazines were obviously designed to appeal to the prurient interest of the public generally. It is noted, too, that some of the persons shown appear again and again in the photographs, a fact indicating that professional models were sometimes used, that the photographs are posed pictures, and that they are not newsworthy pictures of chance scenes at nudist gatherings. Nearly all of the photographs appear to stress the portions of the body which are not normally revealed in public or in printed materials. As a matter of fact, practically all that the purveyor of such magazines has to sell is his willingness, for a price, to flout the moral code which society has built up through the generations as best for human beings in our civilization. These magazines scarcely pretend to be the publications of the nudist movement, there is very little textual material in them, and little or nothing in them about the activities of nudist groups. Their only function and purpose are obviously to appeal to the prurient interest of the public. In fact, their only sales value is their showing of pictures that other publications do not contain through deference to the moral code of the community.

In the words of the Roth test, we think that the trier of the facts could properly hold that the dominant theme of the magazines in question, to the average person applying contemporary community standards, "taken as a whole appeals to prurient interest." This conclusion, we think, is also consistent with the consideration of the sordid business of pandering, as discussed in the Ginzburg case, supra.

Nevertheless, we concur in what appears to be the generally prevailing view that nudity alone is not obscene. See Sunshine Book Company v. Summerfield, 355 U.S. 372, 2 L. ed 2d 352, 78 S. Ct. 365 (1958). That does not mean, of course, that nudity may not become obscene by its manner of presentation and by "pandering."

We fully realize the great difficulty faced by a judge or some other person, who may be charged with the duty of determining whether a certain material is obscene or not. Such a determination is largely a subjective thing, for what is obscene to one person may seem perfectly proper to another. To paraphrase a poet's words: Obscenity "lies in the mind of the beholder." Another apt expression might be: Obscenity to him who obscenity thinks. Fortunately, however, the U. S. Supreme Court in the Roth and Ginzburg cases, supra, has furnished some usable guidelines, which we have tried to apply herein.

There are two additional factors in this appeal that reinforce our decision to concur in the holding of the municipal court that the magazines in question are legally obscene.

The first factor is the fact that the municipal court in the proceedings before it sat as the trier of the facts,

and the question of obscenity was at least in part a question of fact for the trier of the facts to determine. It is fundamental, of course, that an appellate court may not substitute its judgment for that of the trier of the facts, where there is sufficient, competent evidence to support the trier's factual findings.

The second factor is the fact that the test of obscenity recognized in the Roth case, supra, is whether "to the average person applying contemporary community standards" the dominant theme of the material taken as a whole appeals to prurient interest. Certainly the judge of the Municipal Court of the City of Pensacola is in a much better position than the members of this court to know the "contemporary community standards" prevailing in the said city, where the alleged offenses took place. Incidentally, the record of the trial proceedings shows that the municipal court was aware of the Roth decision and endeavored to apply the test of obscenity recognized therein.

We have considered the other points raised by the appellants herein and find those points to lack substantial merit.

For the foregoing reasons, we affirm the said decision of the Circuit Court, and the writ of certiorari must and it is

Discharged.

Wigginton, *Chief Judge,* and Sack, *J.,* Concur.

Filed Jul. 28, 1967

Recorded in the Public Records of Escambia County, Florida, in the book and page noted above. J. A. Flowers, Clerk Circuit Court by Lois Keunn, Deputy Clerk.

APPENDIX C.

Judgment of the District Court of Appeal, First District, State of Florida.

Mandate From District Court of Appeal of Florida, First District.

To the Honorable, the Judges of the Circuit Court for the First Judicial Circuit of Florida. Greetings:

Whereas, Lately in the Circuit Court of The First Judicial Circuit for the County of Escambia in a cause therein styled:

City of Pensacola vs. Roy Michael Felton, Ralph Franklin Moore, James Hollingshead, Joseph W. Spirakis and Ralph James Armantrout. Case Nos. 65-1499; 65-1501; 65-1503; 65-1505; 65-1507.

the Judgment of said Court was rendered February 28, 1966, as appears by inspection of the pertinent record of the said Court in said cause, which was brought into the District Court of Appeal of Florida, First District, by virtue of proceedings agreeable to the laws of said State in such case made and provided;

And Whereas, the said cause came on to be heard before the said District Court, in consideration whereof, on July 6, 1967, the said District Court rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof, therefore:

It is Ordered by the Court that the..... do have and recover of and from the ..... costs in this behalf expended herein taxed at Twenty Five Dollars, and that all costs shall be taxed in the said lower court; and

You are Hereby Commanded, That such further proceedings be had in said cause as according to right, justice, the judgment of said Court, and the laws of the State of Florida, ought to be had, the said Judgment of said Circuit Court notwithstanding.

Witness, The Honorable John T. Wiggintton, Chief Judge of said District Court, and seal of said Court at Tallahassee, this 27th day of July, 1967.

Raymond E. Rhodes
Clerk District Court of Appeal of Florida
First District.

Filed for Record
Escambia County, Fla.
July 28 8:15 AM '67
Joe A. Flowers
Clerk, Circuit Court
Pensacola, Fla.

APPENDIX D.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The Ordinance of the City of Pensacola is as follows:

> "Sec. 20-36. Obscene material, exposure, sale and distribution.
>
> "It shall be unlawful for any person to expose, circulate, offer for sale, sell or distribute within-in the corporate limits of the city, any obscene, scandalous or libelous books, print, newspaper, phamphlet, circular, or periodicals, caricature, picture, drawing, statute, or other object whatsoever of any immoral or scandalous nature, or calculated to excite scandal, immorality or disturbance of the public peace or tranquility. (Code 1950, § 21. 32)".

4 The pertinent provisions of the Florida statute [FSA 847.011 (Laws 1961, C. 61-7, §§1-11)] are:

> "(1) (a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or trans-

mutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; . . . is guilty of a misdemeanor. . . .

* * *

"(5) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character."